

# The *FAR's* Commercial F

**When using simplified acquisition procedures, contracting professionals must ensure that the procedures are just that—straightforward, with minimal requirements to determine the winner.**

BY RONALD DIETZ

Imagine you are a contracting professional who works for the federal government. Across your desk comes a new requirement for several million dollars worth of commercial items and services. How do you get these items into the hands of your customers as fast as possible and at the lowest cost? Would you use FAR Part 12, FAR 13.5, or a GSA schedule?

FAR 13.003(a) states, “Agencies shall use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold.”

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There are only a few exceptions to this policy, such as when an agency can meet its requirement using required sources from FAR Part 8, an existing indefinite delivery/indefinite quantity contract, or other established contracts.

FAR Subpart 13.5 provides special authority for acquiring commercial items exceeding the simplified acquisition threshold, but not exceeding \$5 million, including options. Why did Congress give the federal government this special authority? The history of FAR Part 13 provides the answer.

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA), authorizing the use of simplified acquisition procedures for purchases not exceeding \$100,000. Congress permitted the use of expedited and streamlined evaluation and selection procedures to award smaller dollar value contracts. In 1996, Congress authorized a test program that permitted enhanced discretion and flexibility, as well as the use of the simplified procedures described in FASA, for purchases of commercial items exceeding the \$100,000 threshold for simplified acquisition procedures, but not exceeding \$5 million. The regulations implementing this authority are set forth at FAR Subpart 13.5 (Test Program for Certain Commercial Items).

Per FAR 13.500(b) for the period of the test, contracting activities must employ the simplified procedures authorized by the test to the maximum extent practicable. But does this statement mean simplified acquisition procedures should always be used? To answer, let's look at what FAR Subpart 13.5 does for

the federal government to make buying easier between the dollar thresholds of \$100,000 to \$5 million:

(1) It permits agencies to use any simplified acquisition procedure in FAR Part 13, subject to dollar limitations, to test whether the additional flexibility “maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry.”<sup>1</sup>

(2) It incorporates the requirements of FAR Part 12 (Acquisition of Commercial Items). This is very important, since FAR Part 12 relaxes many of the requirements that must be followed for larger dollar buys when bought using the authority of other parts of the *Federal Acquisition Regulation (FAR)*. Included in the relaxed requirements are optional procedures for streamlined evaluation of commercial product offers.<sup>2</sup> These requirements provide that:

- When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at Part 52.212-2 (Evaluation—Commercial Items) in solicitations for commercial items, or comply with the procedures in Part 13.106 if using simplified acquisition procedures.

- If 52.212-2 is used, paragraph (a) shall be tailored to describe the evaluation factors and their relative importance.

# flexibility

- If simplified acquisition procedures are used, contracting officers are not required to describe the relative importance of the evaluation factors.

The above contrasting approaches to evaluating offers for commercial items leaves the contracting officer with considerable discretion in selecting procurement procedures. They permit the use of expedited and streamlined evaluation and selection procedures for awarding smaller dollar contracts. Meanwhile, the courts have been looking at the substance of an agency's actions rather than the form (i.e., whether the agency used a request for proposal versus simplified acquisition procedures) in the most recent cases.

## A Case Study

Ready to test your knowledge of the FAR? The following are real purchasing requirements. Would you make the same decision?

### *Request for Proposals*

A request for proposals was issued to procure meals, lodging, and transportation for newly arrived U.S. Army soldiers. The RFP stated that the acquisition was to be a commercial one. The government was using simplified acquisition procedures, and anticipated an award of a fixed-price, indefinite-quantity contract with a base year plus four one-year options. The RFP stated that the offeror whose proposal was the most advantageous to the government would win the award. It also listed five non-price evaluation factors,



including a quality control factor for which offerors had to develop a unique quality control plan. A contracting officer had to approve any changes to the plan throughout the life of the contract. The five non-price evaluation factors were:

- (1) facility quality;
- (2) food and transportation;
- (3) facility location;
- (4) quality control; and
- (5) past performance.

In addition, the RFP listed price factors under the evaluation factors section. It stated, "technical/quality factors are more important than cost or price." The RFP was silent on the role of any non-price evaluation factor other than past performance. Past performance was set forth in considerable detail, including how it would be used and what would be considered.

On the government's side, the technical evaluation team performed a full-scale evaluation of the offerors' proposals. They formed a three-member panel that performed on-site inspections of the four acceptable offerors' lodging and dining facilities. The evaluators scored proposals and developed a consensus rating with more than 85 pages of handwritten notes and completed forms. They prepared a written selection recommendation for the local commander to sign. The contracting officer accepted the commander's recommendation in a document written just for the contract file.

Of the six proposals received, only four were considered acceptable. Let's look at the four offerors' technical scores and proposed prices and how they compared:

- Best Western's technical score was 89 (good). Its price was \$1.46 million and its proposed hotel was 30 years old and about three miles from the government facility.

- Finlen's technical score was 77 (satisfactory). Its price was significantly below Best Western's. Its hotel was built in 1924 (in a National Historical Landmark District), and was located only two blocks from the government facility. (Finlen also was the incumbent.)

- Offeror A's technical score was similar to Best Western's. Its price was above Best Western's.

- Offeror B's proposal was initially accepted but later rejected by the technical panel.

Which offeror do you think the contracting officer selected for award? Take a minute to review the earlier facts to see what issues may have influenced the decision.

### *The Decision*

The evaluation team had recommended that the contracting officer

...award to either [Best Western] or [Offeror A]. Both locations have exceptionally strong attributes in their ability to fulfill the obligations of the contract. [Best Western] submitted a total price of \$1,462,385.50 for the base year and four option years and [Offeror A] submitted a total price of \$1,566,407.50 for the base year and four option years.

Based on the team's recommendation, the contracting officer determined that Best Western Butte Plaza Inn's offer was the best, considering the technical and cost factors.

### *The Protest*

According to the FAR, a contracting officer's explanation for selecting a proposal for award should state a qualitative assessment of the technical differences between all offerors. Or alternatively, the explanation should conclude that the proposals are technically equivalent, with a corresponding decision stating that there are no benefits in the losing offeror's proposal that justify paying its higher price. Without such assessments, the selec-

tion is not reasonable.

The U.S. General Accounting Organization (GAO) did not agree with the contracting officer's decision to award to Best Western. The court determined that the selection decision was improper because it lacked a rationale that outlined the tradeoffs made in the selection process, including an explanation of any perceived benefits associated with additional costs being incurred.

The government argued that pursuant to FAR 12.602(a) and 13.106-1(a)(2), agencies are not required to advise offerors of the relative weight of evaluation factors when using simplified acquisition procedures. In essence, the army claimed that the case was a challenge to the RFP's use of simplified acquisition procedures, and should be dismissed as untimely. GAO disagreed and stated that the protester's expectations regarding the relative weight of past performance in the RFP was reasonable.

Remember the government's evaluation factors? The weight for each non-priced factor was not disclosed in the RFP. They were:

- facility quality—30 percent,
- food and transportation—25 percent,
- facility location—20 percent,
- quality control—20 percent, and
- past performance—5 percent.

The RFP stated, "technical/quality factors are more important than cost or price." The RFP was silent on the role of any non-price evaluation factor other than past performance, which was set forth in considerable detail.

GAO concluded that by requiring the offerors to prepare detailed proposals addressing several non-price evaluation factors, fairness dictated that the agency reveal to the offerors the relative weight of the evaluation factors that would be used to assess those proposals.

The army stated it withheld the relative weights of the evaluation factors because disclosure could lead offerors to "skew" their proposals to the more important factors, and would hinder the agency's ability to change the weight of these factors during the course of its evaluation.

According to GAO, the acquisition procedures used by the government could hardly be called "simplified." Despite the label, said GAO, the procurement was very similar to any other negotiated acquisition conducted under the rules set forth in FAR Part 15. When offerors are asked to prepare detailed proposals, those offerors must be advised of the weight of all factors and significant subfactors that will affect the contract award.

GAO stated,

Although it is not our role...to recommend that the agency use, or not use, a particular approach (to procure)... our Office has expressed concerns that the test program to date is not including an assessment of the extent to which, among other things, the time required to award contracts is being reduced, or administrative costs are being reduced. The approach that the Army adopted here would not appear to have furthered either of those goals of the test program.<sup>3</sup>

### What the Future Holds

Could the GAO's stated criteria become required justification for contracting officers using FAR Subpart 13.5 in the future? In a final report, "Contract Management: Benefits of Simplified Acquisition Test Procedures Not Clearly Demonstrated," the GAO stated that federal agencies would like permanent authority to purchase commercial items using these simplified procedures, and have argued that there are benefits associated with using the test program. However, those benefits have not been demonstrated. The report goes on to state that before providing permanent authority for FAR Part 13.5, Congress should consider extending the authority until 2005 and requiring procedures be developed to demonstrate that the

desired results are being achieved. The report suggests an assessment to show the extent to which

- time required to award contracts was reduced,
  - administrative costs were reduced,
  - prices reflected the best value,
  - small business participation was promoted, and
  - delivery of products and services was improved.
- Only time will tell what Congress will do.

### How Did You Do?

Did you notice that the government's request for and evaluation of detailed proposals should not be used when buying commercial items/services using simplified acquisition procedures? If contracting professionals say they are going to use simplified acquisition procedures, then the procedures should be just that, straightforward and kept to the minimum of what is needed to determine the winner.

Remember that Congress has stated, "for the period of the test, contracting activities must employ the simplified procedures authorized by

the test to the maximum extent practicable," but that does not mean in every case. Congress wants contracting officers to use their acquisition and subject matter expertise, as they review the details of each procurement request before making a decision about how to buy needed items or services.

Today's contracting officers are business advisors and as such, they have many different procurement methods at their disposal. It's simply a matter of knowing the right way versus the fastest way to award the contract. After all, even the fastest procurement method will be useless if the decision will not hold up in court. **CM**

### Endnotes

1. FAR 13.500(a).
2. FAR 12.602(a).
3. The actual case is *Finlen Complex, Inc.* File: B-288280. Date: October 10, 2001. The award was made by the Department of the Army's Directorate of Contracting, Fort Knox, Kentucky, pursuant to RFP #DABT23-01-R-0010, issued to procure for the Military Entrance Processing Station in Butte, Montana.



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